U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-, INC.

DATE: FEB. 1, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an operator of a mobile and online marketplace, seeks to employ the Beneficiary as a software development engineer. It requested his classification under the second-preference, immigrant visa category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

After the Director of the Nebraska Service Center sought additional evidence of the Beneficiary's qualifications for the listed visa classification, the Petitioner asked to change the category. The Director denied the request. Concluding that the record did not establish the Beneficiary's eligibility for the listed classification, the Director then denied the petition and the Petitioner's following motions to reopen and reconsider.

On appeal, the Petitioner concedes the Beneficiary's ineligibility for classification as an advanced degree professional. The company asserts, however, that the Director should have changed the listed classification, which it attributes to a clerical error.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Unless seeking Schedule A designation or a waiver in the national interest, immigration as an advanced degree professional follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves an offered position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204

of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets requirements of an offered position and a requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE VISA CLASSIFICATION

In Part 2 of the Form I-140, Immigrant Petition for Alien Worker, the Petitioner checked the box requesting the Beneficiary's classification as an advanced degree professional. As previously indicated, an advanced degree professional must have an "advanced degree." Section 203(b)(A) of the Act. That term means:

> any United States professional or academic degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

The petition, however, does not establish the Beneficiary's possession of an advanced degree. The record shows that, before the Petitioner began employing the Beneficiary in nonimmigrant visa status in the offered position, he had about five and a half years of experience in software design and development.[1] But he gained more than three years of that experience before the issuance of his bachelor's degree. In a request for evidence (RFE), the Director notified the Petitioner of this deficiency and asked for additional evidence of the Beneficiary's possession of an advanced degree.

In its RFE response, the Petitioner did not submit additional evidence of the Beneficiary's qualifications, but rather requested to change the visa classification. The Petitioner submitted a new Form I-140 requesting the Beneficiary's classification under the third-preference category as a professional. *See* section 203(b)(3)(A)(ii) of the Act. That "EB-3" category would require his possession of only a bachelor's degree. *Id.*

A petitioner must establish eligibility as of a petition's filing and throughout its adjudication. 8 C.F.R. § 103.2(b)(1). A petitioner "may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to [USCIS] requirements." *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Before the issuance of a decision, however, a petitioner may request correction of a visa classification resulting from a clerical error. USCIS' website, however, cautions petitioners who would seek to change visa classifications. It

[1] Labor certification employers cannot rely on experience that a foreign national gained with it, unless the experience was in a position substantially different from the offered position or the employer can demonstrate the impracticality of training a worker for the position. 20 C.F.R. §§ 656.17(i)(3)(i), (ii). The Petitioner here does not state reliance on the Beneficiary's experience with it.

states: "Although you may request that we change the visa classification to correct a clerical error in Part 2 of the form, we will make the final determination about whether to change the visa classification based on everything in your case." USCIS, "Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker," https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker (last visited Jan. 31, 2019). The website also advises petitioners to check their Form I-140 receipt notices to ensure that the notices state correct visa categories and, if not, to call USCIS "immediately." *Id.* The website therefore indicates that USCIS reserves a visa classification change only for a petitioner who inadvertently checked the wrong box in Part 2 of its Form I-140. The policy does not allow a petitioner multiple attempts, through a single petition, to obtain approvals in various visa categories.

On appeal, the Petitioner asserts that its EB-2 classification request for the Beneficiary constituted a clerical error. The company argues that, because "it was absolutely impossible for the beneficiary to have qualified under the EB-2 classification . . ., it was clear that the initial request for EB-2 classification on Form I-140 was a clerical error."

Contrary to the Petitioner's argument, however, the classification error need not have been clerical in nature. It could have been: a legal error, reflecting a misunderstanding of the EB-2 requirements; a factual error, reflecting unfamiliarity with the Beneficiary's specific qualifications; or both. Here, the record does not establish the EB-2 classification request as a clerical error. Counsel asserts that "our office inadvertently checked" the wrong box in Part 2 of the Form I-140. Counsel, however, neither details the circumstances of the error, nor submits corroborating evidence of its purported clerical nature.

Also, as the Director indicated, the timing of the Petitioner's classification-change request suggests the company's initial intention to seek EB-2 designation. Contrary to USCIS website information, the Petitioner did not notify the Agency of the error "immediately" after the issuance of the petition's receipt notice. Rather, the Petitioner notified USCIS more than seven months later, after the RFE questioned the Beneficiary's eligibility for EB-2 classification. In addition, the Petitioner's RFE response did not describe the EB-2 classification request as a clerical error. The Petitioner did not assert the clerical nature of the error until filing its motions to reopen and reconsider. The Petitioner's delays in notifying USCIS of the error and its purported nature cast doubts on the company's claims.

Finally, the job requirements of the offered position also indicate the Petitioner's initial intention to seek EB-2 classification. Consistent with the definition of an advanced degree, the labor certification states the job's primary requirements as a master's degree and three years of experience, with alternate acceptance of a bachelor's degree and five years of experience. The Petitioner argues that the labor certification does not expressly state the post-baccalaureate nature of the alternate experience requirement. A preponderance of evidence, however, indicates that the Petitioner completed the labor certification intending to seek EB-2 classification.

III. CONCLUSION

The Petitioner has not demonstrated that the Director erred in denying its request to change visa classification. We therefore consider the petition to request advanced degree classification. As the Petitioner does not dispute the Beneficiary's ineligibility for the requested classification, we will affirm the petition's denial.

ORDER: The appeal is dismissed.

Cite as *Matter of G-, Inc.*, ID# 2649890 (AAO Feb. 1, 2019)